Supreme Court, U.S.
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No. 08-764

In The
Supreme Court of the United States

ROSLYN PORTER,

Petitioner,

v.

NATIONSCREDIT CONSUMER DISCOUNT COMPANY; PROTECTIVE LIFE INSURANCE COMPANY; FAIRBANKS CAPITAL CORPORATION; NATIONSCREDIT FINANCIAL SERVICES CORPORATION; NATIONSCREDIT INSURANCE AGENCY, INC., A PENNSYLVANIA CORPORATION; NATIONSCREDIT INSURANCE AGENCY, INC. AN ARIZONA CORPORATION; NATIONSCREDIT INSURANCE CORPORATION; NATIONSCREDIT CONSUMER CORPORATION; BANK AMERICA, N.A., AND OTHER DEFENDANTS WHO ARE YET UNKNOWN TO THE PLAINTIFF CLASS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

I. Whether the U.S. Third Circuit's unpublished opinion, which affirmed the trial court's finding that Petitioner's "sham insurance" argument was "completely meritless" under state law, is an important question of federal law that should be settled by this Court.

II. In the absence of any valid TILA claim by Petitioner, whether this Court should review the U.S. Third Circuit's unpublished opinion, which followed every circuit court decision in the nation in concluding that a TILA plaintiff seeking actual damages must plead and prove detrimental reliance to establish proximate cause.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Roslyn Porter

NationsCredit Consumer Discount Company, now known as NationsCredit Financial Services Corporation: The parent corporation is Bank of America Corporation, a publicly traded entity.

NationsCredit Insurance Agency, Inc., a Pennsylvania Corporation: The parent corporation is Bank of America Corporation, a publicly traded entity.

NationsCredit Insurance Agency, Inc., an Arizona Corporation: The parent corporation is Bank of America Corporation, a publicly traded entity.

NationsCredit Insurance Corporation: The parent corporation is Bank of America Corporation, a publicly traded entity.

NationsCredit Consumer Corporation: The parent corporation is Bank of America Corporation, a publicly traded entity.

Bank of America, N.A.: The parent corporation is Bank of America Corporation, a publicly traded entity.

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COUNTERSTATEMENT OF THE CASE

The genesis of this case is a March 26, 1998 mortgage loan agreement between Petitioner and Respondent NationsCredit Consumer Discount Company ("NCCDC"). As part of the loan transaction, Petitioner signed a number of documents that clearly expressed her decision to purchase optional credit life insurance coverage on her mortgage loan. The gravamen of this litigation has always been whether Petitioner can nonetheless claim that she did not voluntarily purchase a credit life insurance policy.

By narrowly framing the two questions presented to this Court, Petitioner has waived the vast majority of the claims dismissed below, including the Petitioner's request for class certification. This Court's normal practice is to refuse to consider arguments not presented in the petition for certiorari. *See e.g., Radio Officers v. NLRB*, 347 U.S. 17, 37 n.35, 74 S. Ct. 323 (1954). Consequently, this is a single plaintiff case.

Petitioner's 2001 Complaint asserted claims under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"); the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639 ("HOEPA"); Regulation Z, 12 C.F.R. § 226 ("Reg. Z"); and the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* ("UTPCPL").

Count I of Petitioner's Complaint generally alleged that Respondents violated TILA and HOEPA by failing to give Petitioner adequate disclosures, and by failing to rescind her mortgage loan transaction.

In Count II, Petitioner alleged that Respondents violated TILA Section 1605(b) because the TILA Disclosure Statement given to Petitioner at her loan closing improperly understated the finance charge by including the $3,281.98 premium for credit life insurance in the "amount financed" instead of the "finance charge." Specifically, Petitioner alleged that the insurance premium should have been included in the "finance charge" because Petitioner's purchase of credit life insurance was not "voluntary." Petitioner also asserted in Count II that NCCDC's alleged understatement of the finance charge violated HOEPA, which imposes additional disclosure requirements on creditors where the total points and fees paid by a borrower exceed eight percent of the total loan amount. Petitioner also asserted that Respondents violated TILA Section 1638 by failing to disclose the exact amount of the $3,281.98 credit life insurance premium that was retained by Respondents as a commission.

In Count III, Petitioner asserted that Respondents violated the UTPCPL by engaging in a "scheme causing the likelihood of confusion or misunderstanding" as to the "source" of her credit life insurance coverage, and as to the "affiliations, connection or association" of the entities "splitting the 'premium' and providing the 'insurance coverage.'" Petitioner also asserted a claim under the UTPCPL that Respondents allegedly concealed the "true nature" of the credit life insurance transaction, and allegedly misled

Petitioner about the "voluntary nature" of the insurance coverage.

Petitioner, individually, and on behalf of an ill-defined, and grossly overbroad group of all people who purchased credit life insurance from any defendant, sought actual damages, civil penalties, rescission of her mortgage loan, the return of all loan payments, elimination of her mortgage loan debt, attorneys' fees and costs under TILA, as well as enhanced damages under HOEPA.

In 2004, NCCDC filed a Counterclaim against Petitioner based on her default under the terms of her mortgage loan by failing to make payments when due.

In a nutshell, Petitioner's "theory of the case" against Respondents was that Petitioner was somehow "tricked" into buying a $3,281.98 credit life insurance policy that she did not want. After more than five years of full-blown discovery, Respondents' successful Rule 12(b)(6) and Rule 56 motions, the trial court's denial of class certification, and a two-day bench trial, the court ultimately dismissed all of Petitioner's claims, and entered a $55,834.22 verdict against Petitioner and in favor of NCCDC on its Counterclaim.

On appeal, the Third Circuit affirmed all of the district court's rulings in an unpublished, non-precedential opinion that adopted the trial court's "thorough" and "succinct" explanations about why the

court rejected Petitioner's claims, and why Petitioner was not entitled to any relief.

COUNTERSTATEMENT OF FACTS

This lawsuit arose out of a $33,265.34 loan entered into on March 26, 1998 by Petitioner in favor of defendant NCCDC, which was secured by a mortgage on Petitioner's residence.[1] As part of the mortgage loan transaction, Petitioner purchased credit life insurance for a single premium of $3,281.98, which was included in the $31,895.34 "amount financed." The credit life insurer was defendant Protective Life Insurance Company ("Protective").

At the loan closing, Petitioner signed a TILA Disclosure Statement, which clearly advised her that "[c]redit life insurance, credit disability insurance and credit unemployment insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost, which will be included in the Amount Financed." Porter's TILA Disclosure Statement also included Petitioner's signed affirmative request for the insurance, in which she affirmed, "I want single credit life insurance." The TILA Disclosure Statement also disclosed, under

[1] As this Court has no need to examine the record at the certiorari stage, and the filing of the record is not part of the certiorari process, Respondents have not included citations to the record below.

the "amount paid to others," the $3,281.98 lump sum premium, along with a notation that NCCDC "may be retaining a portion" of this lump-sum payment.

At the loan closing, Petitioner signed a HUD 1A Settlement Statement, which showed that Petitioner was paying a $3,281.98 premium to Protective for 180 months of credit life insurance coverage. Petitioner also signed a Notice of Right to Cancel, in which Petitioner acknowledged her right to cancel the loan transaction within three days for any reason.

Petitioner signed the Mortgage, which stated, "THE PURCHASE OF CREDIT LIFE OR CREDIT HEALTH INSURANCE IS NOT A PREREQUISITE TO OBTAINING THIS LOAN." Petitioner also signed a Credit Life Insurance Application, which additionally disclosed: "You further understand: (1) the insurance is not required or needed in order to obtain the loan." Petitioner's Certificate of Insurance stated, "You were issued this Certificate because you indicated you wanted the insurance." The Certificate also informed Petitioner that she had a free, no-risk ten-day trial period to further evaluate the credit life insurance coverage, and if Petitioner changed her mind and chose to cancel the coverage within that period the entire premium would be returned.

Petitioner testified under oath at trial that she did not bother to read any of these loan documents before she signed them. Petitioner read her loan documents shortly after she returned home from the

loan closing. Petitioner did not cancel her insurance coverage within the 10-day grace period.

Petitioner had purchased credit life insurance on a prior 1997 mortgage loan. Petitioner gave NCCDC the paperwork for her prior loan when she applied for her NCCDC loan, and instructed NCCDC that she wanted a loan "just like" the prior loan.

PROCEDURAL HISTORY

The following is a summary of the trial court's *seriatim* disposition of all of Petitioner's claims.

On February 9, 2004, the trial court partially granted Respondents' Rule 12(b)(6) Motion to Dismiss. The district court dismissed Petitioner's class claims for actual damages under TILA because Petitioner failed to plead the essential element of detrimental reliance. It is from this Order that Petitioner seeks relief from this Court, arguing that she was not required to plead detrimental reliance in order to recover actual damages under TILA.

In that Rule 12(b)(6) ruling, the trial court also dismissed Petitioner's "fee-splitting" claim alleging that Respondents violated TILA Section 1638 by failing to disclose the exact amount of the commission retained from the credit life insurance premium paid by Petitioner. The trial court concluded that NCCDC's statement on Petitioner's TILA Disclosure Statement

that it may be retaining a portion of the insurance premium was "adequate as a matter of law."

In the Rule 12(b)(6) Order, the court declined to dismiss Petitioner's TILA Section 1605(b) claim that her purchase of credit life insurance was not "voluntary." The trial court found that there was a triable issue as to whether NCCDC, in fact, required the purchase of credit life insurance as a condition for receiving credit. The court noted that it fully expected NCCDC to move for summary judgment on this remaining sub-issue, and that this component of Petitioner's case "rest[ed] on a foundation that [was] only slightly better than a bald assertion."[2]

On August 2, 2005, the trial court partially granted Protective's Rule 56 Motion for Summary Judgment.[3] The court dismissed two of Petitioner's UTPCPL claims against Protective because Petitioner could not prove that she justifiably relied to her detriment on any conduct covered by the statute. The trial court concluded that the only issue presented was whether Protective tricked Petitioner into purchasing insurance that she did not want. Based on

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[2] According to Petitioner's writ application, this February 2004 Rule 12(b)(6) Order is the only ruling of the trial court that is at issue. Because Petitioner's brief discusses other issues, however, Respondents also discuss the trial court's other rulings.

[3] The trial court chastised Petitioner for "drowning" the court in a "sea of papers" and filing a "rambling series of briefs," by which the Petitioner apparently sought to "prevail by confusing the court."

the undisputed facts, the trial court concluded that, even if Petitioner did not want credit life insurance, Petitioner purchased the insurance and did not cancel it only because she failed to carefully read the loan documents in which she repeatedly requested credit life insurance in writing. The trial court concluded that any alleged "scheme" involving the "source" of the insurance or the "affiliations" among the Respondents "clearly would have had absolutely no impact on [Petitioner's] desire not to have credit life insurance."

The trial court also dismissed Petitioner's alleged "claim," never set forth in her pleadings, that Protective (and Respondents) violated TILA because Petitioner did not receive a *signed* copy of her TILA Disclosure Statement. The court found that, although TILA requires a creditor to obtain a signed affirmative request for credit life insurance from the borrower, TILA does not require the creditor to give the borrower a signed copy of the affirmative request. The court concluded that "TILA was not violated." The district court decided that the only remaining triable state-law issue was whether the UTPCPL required Protective (and Respondents) to give Petitioner a signed copy of her affirmative written request for credit life insurance.

On August 3, 2005, the trial court denied Petitioner's Motion for Class Certification. The court concluded that Petitioner had not satisfied her evidentiary burden of establishing the requirements of typicality and adequacy of representation under Fed.

R. Civ. P. 23(a), and that Petitioner had not proved the predominance or superiority requirements of Fed. R. Civ. P. 23(b)(3).

On March 31, 2006, the district court partially granted Respondents' Rule 56 Motion for Summary Judgment. The court dismissed Petitioner's TILA and HOEPA claims against Respondents Bank of America, NationsCredit Consumer Corporation, NationsCredit Insurance Corporation, and NationsCredit Insurance Agency, on the grounds that TILA and HOEPA applied only to "creditors," so that the only proper defendant was Petitioner's lender, NCCDC. The district court also granted summary judgment in favor of Respondent Fairbanks Capital Corporation. Petitioner did not appeal these orders.

With respect to Petitioner's TILA and HOEPA claims, the trial court found that her purchase of credit life insurance was not "voluntary." The trial court concluded that NCCDC had satisfied three out of the four TILA/Reg. Z requirements for excluding the cost of credit life insurance from the finance charge. The court found that NCCDC had proved that credit life insurance was, in fact, not a condition of extending credit, that NCCDC properly disclosed this fact in writing, and that NCCDC adequately disclosed the premium for the initial term of Petitioner's insurance coverage.

With respect to the final requirement – whether Petitioner signed an "affirmative request" for credit life insurance – the trial court concluded that, even

though it was "unlikely that a jury reviewing all of the evidence in the record would find that [Petitioner] did not sign an affirmative request for credit life insurance, it [was] not for the Court to make credibility assessments of the evidence at summary judgment."

After entering all of these Orders, in September 2006, the district court gave Petitioner her day in court as to the issue that underlies each of her claims: Did Petitioner voluntarily purchase credit life insurance coverage? After two days of trial, the court found that Petitioner had indeed voluntarily purchased insurance, and dismissed Petitioner's remaining claim.

At trial, the court found that Petitioner signed numerous documents at her loan closing, each of which clearly showed that she agreed to purchase voluntary credit life insurance on her mortgage loan, notwithstanding Petitioner's alleged prior oral assertion that she did not want it. The court also found that, although Petitioner did not read the loan documents before she signed them, she did read the loan documents when she returned home after the closing. The court also found that, based on the numerous disclosures made on the face of the loan documents, Petitioner did, in fact, know that she had purchased credit life insurance and that she could cancel the insurance, but that Petitioner decided not to cancel. Finally, the court flatly rejected Petitioner's trial testimony that she did not "realize" that she had purchased credit life insurance, despite having signed

and read numerous loan documents showing that she had purchased the insurance policy, finding that Petitioner's testimony was "simply not credible."

Based on these factual findings, the trial court dismissed all of Petitioner's remaining TILA, HOEPA, and UTPCPL claims against Respondents, and entered a verdict of $55,834.22 against Petitioner on NCCDC's Counterclaim for Petitioner's default under her mortgage loan agreement.

Petitioner then appealed this action to the Third Circuit Court of Appeals. The bulk of Petitioner's appellate brief had nothing to do with these four simple but crucial facts. Instead, as here, Petitioner resented many irrelevant arguments involving reinsurance, risk shifting, ERISA, KESOPs, and insurance rates, which the trial court had correctly rejected as "completely meritless claims" and "strange schemes imagined by [Petitioner's] counsel."

On August 28, 2008, the Third Circuit rendered an unpublished, non-precedential opinion affirming the trial court's "numerous Orders and Memorandum Opinions." The Third Circuit found that the trial court's many rulings "thoroughly and succinctly explained why it was rejecting [Petitioner's] legal arguments, and why she was not entitled to relief against any of the entitles she had sued." After reviewing the record and the arguments raised on appeal, the Third Circuit concluded that Petitioner's arguments "merit[ed] no further discussion." The Third Circuit affirmed the rulings of the district court

"substantially for the reasons set forth in the applicable Orders and Memorandum Opinions." The Third Circuit thereafter denied rehearing en banc.

This petition challenges only *two* of the lower courts' rulings. First, Petitioner asserts that the lower courts incorrectly rejected her state-law "sham insurance" arguments, which the trial court described as "completely meritless claims," and "strange schemes imagined by [Petitioner's] counsel." Second, Petitioner challenges the lower courts' decision to follow every other circuit court in concluding that Petitioner must allege detrimental reliance in order to recover actual damages under TILA.

REASONS THE PETITION SHOULD BE DENIED

I. The U.S. Third Circuit's Unpublished Opinion, Which Affirmed the Trial Court's Finding that Petitioner's "Sham Insurance" Argument Was "Completely Meritless" Under State Law, Presents No Important Question of Federal Law that Should Be Settled by this Court.

This Court's settled practice is to accept, absent the most exceptional circumstances not present here, findings of fact in which the district court and the court of appeals have concurred. *Branti v. Finkel*, 445 U.S. 507, 512, 100 S. Ct. 1287 (1980). A petition for certiorari, therefore, is rarely granted where, as here,

the asserted error consists of erroneous factual findings. SUP. CT. R. 10.

In the trial court, Petitioner presented the bizarre argument that her credit life insurance was "not really insurance," under Pennsylvania law, simply because Respondents and Protective entered into a series of common-place reinsurance-related contracts, such as a "reinsurance agreement," a "recapture agreement," and a "guaranty." The district court quickly and succinctly dispatched with Petitioner's "sham insurance" argument, concluding that none of her "completely meritless" theories had anything to do with Petitioner's TILA, HOEPA or UTPCPL claims. The trial court aptly characterized Porter's "sham insurance" argument as a "strange scheme imagined by [Petitioner's] counsel." Because Petitioner's outlandish theory that her credit life insurance was "not really insurance" is highly fact-specific and governed by state law, it presents no important issue of federal law to be settled by this Court.

Petitioner's "sham insurance" argument is also factually and legally incorrect. The undisputed evidence established that the "insurance relationship" between Protective and NCIC was simply the long-standing and legitimate practice of "reinsurance." Under Pennsylvania law, reinsurance is an "undertaking whereby one insurer agrees to protect another insurer, known as the reinsured, either wholly or partly from the risk which it has undertaken, both policies being in effect at the same time, and the

original insured having no interest in the reinsurance." *USX Corp. v. Adriatic Ins. Co.*, 64 F. Supp. 2d 469, 477 (W.D. Pa. 1998); *E. Eng'g & Elevator Co. v. Am. Re-Insurance Co.*, 309 Pa. Super. 578, 581 455 A.2d 1235, 1236 (1983).

A classic reinsurance situation existed here under state law. The reinsurer (NCIC) assumed all or a portion of the risk underwritten by the ceding insurer (Protective), without assuming any of the obligations owed by the ceding insurer (Protective) to the underlying insured (Petitioner). *See Travelers Indem. Co. v. Scor Reins. Co.*, 62 F.3d 74, 76 (2d Cir. 1995); *Excess & Cas. Reins. Co. v. Ins. Comm'r*, 656 F.2d 491, 492 (9th Cir. 1981); *Crozer Chester Med. Ctr. v. Gerald J. Sullivan & Assocs.*, No. 86-4890, 1989 WL 138887, at *5 (E.D. Pa. Nov. 13, 1989) (citing 13A J. Appelman, INSURANCE LAW AND PRACTICE § 7681 (1976)).[4]

As the original insured under the policy with Protective, under Pennsylvania insurance law, Petitioner had no interest in the separate reinsurance contract between Protective and NCIC. *See USX Corp.*, 64 F. Supp. 2d at 477 (the "original insured

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[4] Reinsurance is a common business practice that actually benefits consumers, by increasing the availability of insurance to the insurance-buying public, and keeping the cost of insurance premiums under control because smaller insurers can compete with larger insurers. *See* Barry R. Ostrager & Mary Kay Vyskocil, MODERN REINSURANCE LAW AND PRACTICE § 102[b] (2d ed. 2000).

ha[s] no interest in the reinsurance"). NCIC owed no duty to Petitioner, because its only obligations were toward Protective, which arose out of the Reinsurance Agreement. *See Reid v. Ruffin*, 503 Pa. 458, 464, 469 A.2d 1030, 1033 (1983). It is, therefore, irrelevant whether or not Petitioner knew, or was informed, that the reinsurance contract existed, or whether or not Petitioner would have relied on the reinsurance agreement in making any decisions regarding her purchase of credit life insurance.[5] *See Crozer*, 1989 WL 138887, at *5 (citing *Greenman v. Gen. Reinsurance Corp.*, 237 A.D. 648, 262 N.Y.S. 569 (App. Div.), *aff'd*, 262 N.Y. 701, 188 N.E. 128 (1933) (an insured has no direct claim on a reinsurance policy even if the insured knew that the reinsurance contract existed or if the insured relied on the insured policy in making subsequent business decisions)).

Petitioner argues that the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101, *et seq.*, somehow supports her speculation that the mere existence of a reinsurance trust account is proof that the reinsurance arrangement between NCIC and Protective was "not really insurance."

Reinsurance trust accounts are routinely created in reinsurance agreements to ensure a statutory

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[5] It is irrelevant if these matters had been disclosed to Petitioner. Petitioner would not have reversed a decision to buy credit life insurance based on any reinsurance disclosure because Petitioner claims that she did not want to buy the insurance under any circumstances.

reserve of sufficient available funds to cover reimbursement of claims paid by the insurer. *See, e.g., N.H. Ins. Co. v. Canali Reinsurance Co.*, No. 03 Civ. 8889LTSDCF, 2004 WL 769775, at *1 (S.D.N.Y. Apr. 4, 2004). The existence of the reinsurance trust account does not change the fact that Protective remained wholly liable to Petitioner for any loss sustained.

Petitioner also suggests the fact that the reinsurance agreement between NCIC and Protective was terminated by a recapture agreement somehow proves that her credit life insurance was "not really insurance." The unwinding of the reinsurance agreement terminated the parties' indemnifications rights, guaranties and obligations under the reinsurance agreement. Just as Petitioner had no "interest" in the reinsurance agreement, she had no "interest" in the termination of that agreement. That is because there was no "privity" between the original insured (Petitioner) and the reinsurer (NCIC). NCIC is in no respect liable to Petitioner "as a surety or otherwise; the contract of insurance and of reinsurance being totally distinct and disconnected." *See USX Corp.*, 64 F. Supp. 2d at 477; *Reid*, 503 Pa. at 464, 469 A.2d at 1034 (no enforceable rights inure to the benefit of the original insured under a reinsurance agreement).[6]

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[6] Petitioner's other pointless ruminations about an alleged "false affidavit" as to whether the insurance premium was transferred to Protective by mail or by wire, and about "unapproved

(Continued on following page)

Petitioner also argues that, even if this were a "true" insurance transaction, the court should not have rejected her "fee splitting" claim, erroneously citing *Gibson v. Bob Watson Chevrolet-GEO*, 112 F.3d 283 (7th Cir. 1997). In *Gibson*, however, the creditor did not disclose that it was retaining any portion of the amount paid to others, while NCCDC properly did so. *See id.* at 284.

Finally, the cases cited by Petitioner in support of her "sham" insurance argument are easily distinguishable. In both *Adams v. Plaza Fin. Co.*, 168 F.3d 932 (7th Cir. 1999), and *Edwards v. Your Credit, Inc.*, 148 F.3d 427 (5th Cir. 1998), the appeal courts examined contractual relationships in which the insurer's liability to the insured was capped at an amount *less than* the total premiums paid, so that no real risk was transferred to the insurer. *See Adams*, 168 F.3d at 934; *Edwards*, 148 F.3d at 442. The reinsurance agreement between NCIC and Protective includes no such cap on Protective's liability to Petitioner.

The federal tax law cases cited by Petitioner to support her argument that there was "no true insurance" are not on point either. *Colonial Am. Life Ins. Co. Comm'r*, 491 U.S. 244, 109 S. Ct. 2408 (1989), does not hold that reinsurance agreements are not really insurance, but only that ceding commissions paid by a reinsurer to an initial insurer under an

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insurance rates," are likewise irrelevant to any TILA or HOEPA claims.

indemnity reinsurance contract are not fully deductible in the tax year reported. *Keller v. Comm'r*, 312 U.S. 543, 61 S. Ct. 651 (1941), does not even discuss reinsurance agreements, much less hold that they do not constitute "real insurance."

In sum, despite all of Petitioner's "strange imaginings" involving "schemes," "deceit" and "trickery," it was Petitioner's own acts that caused her to buy credit life insurance, and ultimately defeated all of her claims. After listening to Petitioner's sworn testimony, and concluding that Petitioner was "simply not credible," the trial court declared, "[Petitioner] is in the unfortunate situation of many borrowers who do not read and question what documents they sign during loan transactions. . . . However unfortunate, this Court cannot release [Petitioner] from her contractual obligations because she did not carefully review her loan documents and exercise her right to cancel."

In sum, Petitioner's "sham insurance" argument presents no important question of federal law that should be settled by this Court. The Petition should be denied.

II. In the Absence of Any Valid TILA Claim by Petitioner, Whether this Court Should Review the U.S. Third Circuit's Unpublished Opinion, Which Followed Every Circuit Court in Concluding that a TILA Plaintiff Seeking Actual Damages Must Plead and Prove Detrimental Reliance to Establish Proximate Cause.

The Third Circuit's decision that a plaintiff must allege and prove detrimental reliance to obtain actual damages under TILA is supported by *every* circuit court in the nation that has addressed this issue. *See In re Ferrell*, 539 F.3d 1186, 1192 (9th Cir. 2008); *Turner v. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001) (en banc); *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433 (5th Cir. 2000), *cert. denied*, 532 U.S. 971, 121 S. Ct. 1601 (2001); *Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000), *cert. denied*, 531 U.S. 1148, 121 S. Ct. 1601 (2001); *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915 (8th Cir. 2000); *Bizier v. Globe Fin. Servs.*, 654 F.2d 1 (1st Cir. 1981) (in dicta).[7]

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[7] *See also Vallies v. State Bank*, 583 F. Supp. 2d 687, 691 (W.D. Pa. 2008); *Cannon v. Cherry Hill Toyota, Inc.*, 161 F. Supp. 2d 362, 369 (D. N.J. 2001) (compiling cases); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 428-31 (S.D.N.Y. 2003).

A. This Court Need Not Decide Whether Reliance Is Required to Recover Actual Damages Under TILA Because Petitioner Has No Valid TILA or HOEPA Claim.

As a threshold matter, this Court need not address Petitioner's argument that reliance is not required to recover actual damages under TILA, because Petitioner has no valid TILA (or HOEPA) claim that would support any relief whatsoever, whether it be actual damages, statutory penalties, or rescission.

In partially granting Respondents' Rule 12(b)(6) Motion, the district court dismissed Petitioner's TILA Section 1638 "fee splitting claim," alleging that NCCDC violated TILA (and HOEPA) by failing to disclose the exact amount of the commission retained from the credit life insurance premium. In granting summary judgment, the district court also dismissed Petitioner's alleged "claim," never set forth in her pleadings, that Respondents violated TILA (and HOEPA) because Petitioner was not given a signed copy of her TILA Disclosure Statement. The trial court also considered, and denied, Petitioner's irrelevant "claims" (based on an alleged ERISA trust account, a reinsurance agreement, a recapture agreement, and a guaranty) as "completely meritless claims" and "strange schemes imagined by [Petitioner's] counsel." After trial, the court also dismissed Petitioner's TILA Section 1605 claim that her purchase of credit life insurance was not "voluntary."

The Third Circuit summarily affirmed the dismissal of Petitioner's TILA and HOEPA claims. In the absence of a valid TILA or HOEPA claim, therefore, Petitioner is not entitled to any damages at all. This Court, therefore, need not even reach the issue of whether Petitioner must plead or prove reliance in order to recover actual damages under TILA.

B. The Third Circuit's Unpublished Opinion Has No Precedential Value.

The Third Circuit affirmed the trial court in a brief, unpublished opinion. Unpublished opinions are not precedential in the Third Circuit. *See* 3d Cir. Internal Operating P. 5.7 ("Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.").

For this reason alone, the Petition should be denied, because the Third Circuit's opinion has no impact on future decisions of any circuit, including the Third Circuit.

C. There Is No Conflict Among the Circuits.

Six circuit courts (and numerous district courts) have concluded that a showing of detrimental reliance is required to recover actual damages under TILA.[8] These unanimous circuit court decisions are

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[8] *See supra* Section II.

supported by TILA's legislative history. As noted by the Eleventh Circuit, "Congress provided for statutory damages because actual damages in most cases would be nonexistent or extremely difficult to prove. To recover actual damages, consumers must show that they suffered a loss because they *relied on* an inaccurate or incomplete disclosure." H.R. Rep. No. 193, 104th Cong., 1st Sess. (1995) (emphasis added), *quoted in Turner*, 242 F.3d at 1028.

The trial court, in granting Respondents' Rule 12(b)(6) Motion to Dismiss Petitioner's "class claims" (but not her own TILA claims) for actual damages under TILA, properly followed this great weight of authority, concluding that the "face of 15 U.S.C. § 1640(a)(1) clearly requires a consumer to show reliance, i.e., that any actual damages suffered were a result of a defendant's failure to comply with the TILA."

Petitioner's bald assertion that reliance is not necessary to prove proximate cause and trigger actual damages under TILA cannot override the circuits' jurisprudence, which this Court has declined to review. For many pages, Petitioner makes broad policy arguments in favor of disposing with the TILA reliance requirement, unfettered by any relevant statutory text, legislative history, or supporting circuit authority. Because this case does not present a circuit split, the Petition should be denied.

D. The Third Circuit's Unpublished Decision Does Not Conflict With This Court's Opinion in *Bridge v. Phoenix Bond & Indemnity Co.*

Petitioner incorrectly states that the lower courts' opinion that a showing of detrimental reliance is required to recover actual damages under TILA is in conflict with this Court's jurisprudence. The decisions cited by Petitioner, however, do not address TILA, but only civil RICO mail fraud and SEC Rule 10b-5 securities fraud actions.

This Court, in *Bridge v. Phoenix Bond & Indemnity Co.*, ___ U.S. ___, 128 S. Ct. 2131 (2008), recently resolved a strong circuit split by unanimously rejecting the contention that a plaintiff asserting a civil RICO claim predicated on mail fraud must plead and prove that the plaintiff himself relied on the defendant's alleged misrepresentations in order to establish proximate cause. *Id.* at 2134.

Bridge is a narrowly crafted, fact-intensive opinion. *Bridge* presented a unique situation where the civil RICO plaintiffs were not the target or recipient of the defendant's allegedly fraudulent mailings, but claimed to have suffered an injury directly resulting from what happened when a third party, which actually received those mailings, relied on them. The parties in *Bridge* were competing bidders in county tax lien auctions. *Id.* at 2135. In these auctions, the county auctioned off to private parties the right to enforce the county's liens against parcels of real

property, which often resulted in the winning bidder acquiring ownership of the property. In return for this right, the winning bidder paid the delinquent taxes to the county. County rules provided that, if the number of bidders willing to accept the lowest possible bid exceeded the number of available liens, the liens would be distributed by lot. To avoid gamesmanship and achieve distributional equity, bidders were forbidden from submitting multiple bids, including bids under other names or through related parties, and bidders had to submit an affidavit to that effect.

The plaintiffs in *Bridge* alleged that the defendants violated these county rules by submitting multiple bids and false affidavits to the county, thus unfairly diminishing the number of parcels on which the plaintiffs were the winning bidders. Because the mails were used to submit the false affidavits to the county, and/or to notify owners that their tax liens had been sold to the winning bidder, the plaintiffs sued the defendants under civil RICO for damages they allegedly sustained from this pattern of mail fraud activity. *Id.* at 2135-36. The defendants moved to dismiss, arguing that, because the plaintiffs themselves had not relied on the mailings, they could not have been injured by them, and thus any RICO claim must fall.

This Court's opinion in *Bridge* reconfirmed the need under RICO to show a proximate causal link between the alleged mail fraud and the plaintiff's claimed injuries, but rejected the argument that this requirement could only be met by a showing that *the*

plaintiff himself had relied on the fraudulent misrepresentations in the underlying mailing. Instead, this Court held that "a showing of first-party reliance is not required," and is not "an element of a civil RICO claim predicated on mail fraud." *Id.* at 2134, 2141. The Court cautioned, however, that "the complete absence of reliance may prevent the plaintiff from establishing proximate causation," and that, in most cases, "the plaintiff will not be able to establish but-for causation if no one relied on the misrepresentation." *Id.* at 2144.[9] Thus, although the civil RICO

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[9] At trial, the court decided that Petitioner did not *prove* detrimental reliance to support her state-law claim for violating the Pennsylvania UTPCPL. The court found that, after Petitioner purportedly said that she did not want credit life insurance, Petitioner represented to NCCDC that she indeed wanted a mortgage loan "just like" her prior loan, which had credit life insurance coverage. Thus, the court decided that there was no misrepresentation by NCCDC that Petitioner was not purchasing credit life insurance. Thus, "no one relied on the misrepresentation," and Petitioner was "not able to establish but-for causation." *See Bridge*, *supra*. The court also found that, even if there had been such a misrepresentation, the falsity of such a representation would have been quite obvious to Petitioner, given the overwhelming number of disclosures given to Petitioner on her many loan documents, and the fact that Petitioner admitted at trial that she read her loan documents when she got home after her loan closing. Based on these findings of fact, the trial court decided that Petitioner could not show that the NCCDC made any "affirmative misrepresentations" to Petitioner that she was not being charged for credit life insurance, and that, if NCCDC had, such reliance was unjustified. The Third Circuit affirmed, finding the trial court's reasoning "thorough and succinct," and concluding that Petitioner's arguments to the contrary "merit[ed] no further discussion."

plaintiff may need to show that "someone relied on the defendant's misrepresentations" in order to satisfy the causation element of a civil RICO claim, under appropriate facts, "third party reliance" can suffice for that purpose. *Id.* This is because, under the particular facts alleged in Bridge, the plaintiffs were injured by the defendants' scheme even though only the county (a third party) relied on the alleged mail fraud.

Bridge established the narrow principle that, in civil RICO cases *only*, a plaintiff is not necessarily required to show *first-party* reliance on the defendant's misrepresentations in order to establish proximate causation between the plaintiff's injuries and the defendant's mail fraud. *Bridge* recognized that proximate cause is a "flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case." *Id.* at 2142.

Petitioner suggests that the *Bridge* opinion, which addresses reliance under civil RICO mail fraud, should be expanded to TILA. Petitioner is attempting to create a "black letter" principle of proximate causation that *Bridge* expressly forbids, and transfer that principle to TILA, an unrelated credit disclosure statute.

This Petition does *not* present the unique circumstances found in *Bridge*, in which a *third party* relied on alleged misrepresentations by defendants, which in turn harmed the plaintiffs. Here, Petitioner never alleged that she was *not* the recipient of the

Respondents' alleged misrepresentations, but nonetheless suffered an injury directly resulting from what happened when a *third party* relied on these misrepresentations. Here, the trial court found that there were no misrepresentations, and no one relied on any alleged misrepresentations. *Bridge*, therefore, in no way supplies a "black letter" rule of proximate cause that can be applied to Petitioner's TILA allegations in this case.

Further, TILA's remedial scheme, which requires that a creditor give material written disclosures directly to a borrower prior to consummation of a credit transaction, does not contemplate a scenario in which the creditor would give these disclosures to a third party, whose reliance on the disclosures would somehow harm the borrower.

Petitioner also incorrectly argues that this Court's opinion in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S. Ct. 1456 (1972), should be extended to TILA. In *Affiliated Ute*, a securities fraud action, the Court allowed a claim for damages without proof of reliance. The *Affiliated Ute* exception to the general requirement of detrimental reliance in SEC Rule 10b-5 cases, however, is attributable to the fact that securities investment decisions often are made in reliance on the integrity of a securities market that does not involve face-to-face transactions. *See Basic Inc. v. Levinson*, 485 U.S. 224, 243-44, 247, 108 S. Ct. 978 (1988). Accordingly, this limited presumption of reliance cannot properly be applied outside the SEC Rule 10b-5 context. *See*

Perrone, 232 F.3d at 439-40 (rejecting application of *Affiliated Ute* to TILA claim) (citing *McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 12 (E.D. Mich. 1976)); *Vallies*, 583 F. Supp. 2d at 692-93 (same); *In re Currency Conversion*, 265 F. Supp. 2d at 429-30 (same); *Elliott v. ITT Corp.*, 150 F.R.D. 569, 582 (N.D. Ill. 1992) ("Because the consumer market is a non-perfect market, the presumption of reliance in fraud on the market . . . cases [cannot] be extended to consumer fraud cases."), *report and recommendation adopted*, 150 B.R. 36 (N.D. Ill. 1992).

In sum, because Petitioner has no valid TILA (or HOEPA) claim to support an award of damages, there is no reason for this Court to review the Third Circuit's unpublished opinion, which follows every single circuit court decision that reliance is required to recover actual damages under TILA. The Petition should be denied.

CONCLUSION

The writ is not to be used when "the most that could be claimed is that the district courts have erred." *Parr v. United States,* 351 U.S. 513, 520, 76 S. Ct. 912 (1956). This Petition does not involve a circuit conflict, an important federal question, or a departure by the lower courts from the accepted and usual course of judicial proceedings. To the contrary, the Third Circuit's unpublished opinion confirming the requirement of reliance under TILA fully complies

with established principles applied by the circuit courts, and does not conflict with any relevant decisions of this Court. The Third Circuit's unpublished opinion rejecting Petitioner's state-law "sham insurance" argument as "completely meritless" certainly does not present an important question of federal law that should be settled by this Court. No error has been shown and no issues merit this Court's review. The Petition for Writ of Certiorari should be denied.

Dated: February 13, 2009

Respectfully submitted,

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